Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-01-202 OF 1997 CONSOLIDATED WITH S-02-669 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA
17 JUNE 1998

Administrative Law *— Exercise of administrative powers — Ouster clause — Cancellation of entry permit — Whether s 59A could preclude High Court from examining validity of exercise of administrative powers conferred by Immigration Act 1963 on substantive and procedural grounds — Immigration Act 1963 s 59A*

Administrative Law *— Exercise of administrative powers — Reasoned decision — Whether a public decision-maker should furnish reasons for cancellation of entry permit — Reasons were in fact given by a public decision-maker — Whether court may examine such reasons — Whether decision to cancel entry permit was in accordance with law*

Civil Procedure *— Certiorari — Application for leave to apply — Failure to resort to remedy of appeal to Minister before applying for leave — Whether leave should be granted*

Civil Procedure *— Stay of execution — Application to stay effect of cancellation of entry pass — Whether stay would amount to granting injunction in violation of s 54(d) of Specific Relief Act 1950 and s 29(2) of Government Proceedings Act 1956*

Constitutional Law *— East Malaysian States — Rights and privileges of — Immigration matters — Whether states are bound by terms of Federal Constitution — Whether art 8(1) of Federal Constitution imposes a duty upon public decision-maker in East Malaysian states to act fairly*

Immigration *— Cancellation of entry permit — Whether cancellation was in accordance with law — Whether s 9(1)(c) of Immigration Act 1963 governs cancellation — Whether s 14 applies instead — Whether there was evidence of public immorality to justify cancellation of entry permit — Whether private immorality is sufficient — Whether public decision-maker is under a duty to act fairly in exercising powers conferred upon it by a statute — Immigration Act 1963 ss 9(1)(c) & 14 — Federal Constitution art 8(1)*

Public Authorities *— Director of Immigration — Powers of — Cancellation of entry permit — Whether Director was under duty to act fairly in exercising power to cancel entry permit — Immigration Act 1963 — Federal Constitution art 8(1)*

The appellant is a West Malaysian who has been residing in Sabah since 1975. He however is not a permanent resident of that state. On 27 December 1995, the first respondent granted the appellant an entry pass which was valid for two years. However, on 12 November 1997 — ie about six weeks before the end of the two year period — the appellant was served with a Notice of Cancellation of Entry Permit dated the previous day, and was issued a special pass valid for seven days within which he would have had to leave Sabah. The

appellant took out an ex-parte originating motion for leave to issue certiorari to quash the first respondent's act of cancelling the entry pass. The appellant's motion for leave was granted despite his failure to have resort to the provisions of the Act under which the remedy of an appeal to the Minister was available. The learned judge, however, declined to stay the effect of the cancellation of the entry pass on the ground that that would amount to granting an injunction in violation of s 54(d) of the Specific Relief Act 1950 and s 29(2) of the Government Proceedings Act 1956.

Subsequently, the appellant's substantive motion for orders of certiorari came on for hearing before Ian Chin J. The learned judge dismissed the appellant's application with costs (see [1998] 2 MLJ 217). The learned judge found that, inter alia: (i) the ouster clause contained in s 59A of the Immigration Act 1963 ('the Act') applied to acts done, or decisions made, by the first respondent; (ii) the ouster clause would not protect decisions arrived at in consequence of an error of law; (iii) there had been no error of law in the cancellation of the appellant's entry permit; and (iv) the respondents were not under a duty to give any reasons to the appellant for cancelling his entry permit. From his written judgment, it was clear that the judge also proceeded on the basis that s 14 of the Act applied to the appellant's case.

Held, allowing the appeals:

(1) In the circumstances of this case, the remedy of an appeal was, for obvious reasons, certainly not equally efficacious as certiorari. Further, there is power in a court granting leave to apply for certiorari to direct that such leave do operate as a stay. Accordingly, the learned judge was entirely correct in granting leave to apply for certiorari despite the appellant's failure to have resort to the remedy of appeal to the Minister (see pp 300H–I and 301A).

However, there was no impediment to the learned judge granting a stay of the first respondent's act of cancelling the appellant's entry permit pending the disposal of the substantive motion for orders of certiorari. Accordingly, the judge was plainly wrong in not granting the stay sought by the appellant (see p 302G).

(2) The liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art 5(1) of the Federal Constitution. However, the fundamental liberty of free access to an independent judiciary to obtain redress is apparently inconsistent with a provision in a statute that seeks to preclude that right by ousting the power of judicial review. This apparent inconsistency is resolved by permitting an ouster clause in a statute to immunize from judicial review only those administrative acts and decisions that are not infected by an error of law. This

principle however does not affect cases that involve either national security or national interest. Because of this, s 59A cannot and does not preclude the High Court from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds (see pp 308G and 309C).

(3) In the context of an East Malaysian State, the statutory pre-conditions appearing in s 9(1)(c) of the Act mutatis mutandis govern the cancellation of an entry permit by the State Authority. Therefore, the second respondent must act in accordance with s 9(1)(c) of the Act when exercising its power to direct the first respondent under s 65(1). Having carefully considered the two provisions (ss 9(1)(c) and 14 of the Act), it was clear that s 14 has no application in the present instance. Section 9(1)(c) on the other hand specifically confers power upon the first respondent to cancel an entry permit granted to persons entering the Federation of Malaysia or any part thereof. The learned judge thus had misdirected himself in law when he failed to have any regard to the provisions of s 9(1)(c) of the Act (see pp 313F and 315B).

(4) The second respondent had taken into account allegations that are stale and which only tend to show that the appellant is a man of poor personal morals. But they bear no relevance whatsoever upon the issue of public morality which is the consideration the Act has made relevant for purposes of cancelling an entry permit. On the respondents' own evidence, therefore, this is not a case of a person whose presence in Sabah is, or would be prejudicial to public morality (see p 318G).

(5) There were reasons given for the cancellation of the permit. Once reasons are given by a public decision-maker for his decision, they may be examined by the court. And if it is found that the reasons disclosed constitute considerations foreign to those stipulated by the empowering statute, the court is obliged to hold that the decision is not in accordance with law. Therefore, the reasons disclosed in Datuk Ghulam Jelani's affidavit relied upon by the respondents are open to curial scrutiny. Upon examination, it is found that the appellant's entry permit was directed to be cancelled because of his private morals. As such consideration is not one of those prescribed by s 9(1)(c) of the Act pursuant to which provision the second respondent admittedly acted, the decision to cancel the appellant's entry permit was not in accordance with law (see pp 319A and 320C); *Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 followed.

(6) While the East Malaysian States have certain rights and privileges reserved unto them by the Federal Constitution, particularly in matters pertaining to immigration, they, like the Federal Government and the government of any of the West Malaysian

States, are bound by the terms of the Federal Constitution. Indeed, there is none within the shores of Malaysia who is ever so high that the supreme law is not above him. Every public decision-maker, including the State authority of an East Malaysian State is accordingly under a duty to observe the provisions of the Federal Constitution. And it is an elementary principle of constitutional law that no Act of Parliament may authorize a public decision-maker to act contrary to the supreme law.

Article 8(1) of the Federal Constitution strikes at the heart of arbitrariness in public decision-making and imposes a duty upon a public decision-maker to act fairly. The second respondent is no different from any other public decision-maker. It too is under a duty to act fairly in exercising the powers conferred upon it by the Act, which in this case was found to be wanting (see p 320G–I); *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 followed.

Per curiam:

(1) The true principle upon which the first respondent ought not to be required to furnish reasons in a case under s 65 of the Act is that he is a mere amanuensis of the second respondent. Even if he does furnish reasons, all he can say is that he acted in accordance with the direction given him by the second respondent. Since this is so, it becomes unnecessary for the court to look to the first respondent for his reasons (see p 325H–I).

(2) The expression 'morality' appearing in s 9(1)(c) of the Act means 'public morality' and not the private or personal morality of an individual. Therefore, the private morality of a person is an irrelevant consideration for purposes of cancellation of that person's entry permit under s 9(1)(c) of the Act (see p 311B).

(3) It is wrong to limit the duty to give reasons only to cases concerning fundamental liberties when the authorities that precede *Hong Leong Equipment* do not impose any such restriction. Therefore, the duty extends to all cases where the rights of a person are adversely affected by a public law decision (see p 326G–H); *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481 not followed.

[Bahasa Malaysia summary

Perayu adalah rakyat Malaysia Barat yang telah bermastautin di Sabah sejak 1975. Beliau namun begitu bukannya merupakan seorang pemastautin tetap negeri itu. Pada 27 Disember 1995, responden pertama telah memberikan perayu permit masuk yang mana sah bagi tempoh selama dua tahun. Walaubagaimanapun, pada 12 November 1997 — iaitu lebih kurang enam minggu sebelum tamatnya tempoh selama dua tahun itu — perayu telah disampaikan dengan satu Notis

Pembatalan Permit Masuk yang bertarikh sehari sebelum itu, dan telah dikeluarkan satu permit khas yang sah selama tujuh hari dalam tempoh yang mana beliau terpaksa meninggal negeri Sabah. Perayu telah mengeluarkan satu usul pemula ex parte untuk kebenaran bagi mengeluarkan certiorari untuk membatalkan tindakan responden pertama dalam membatalkan permit masuk tersebut. Usul perayu untuk kebenaran telah diberikan walaupun kegagalan beliau untuk berpaling kepada peruntukan-peruntukan Akta di bawah yang mana remedi bagi sesuatu rayuan kepada Menteri tersedia ada. Hakim yang bijaksana, walaubagaimanapun, enggan untuk menggantung kesan pembatalan permit masuk tersebut adalah alasan bahawa itu akan membawa kepada pemberian satu injunksi yang melanggari s 54(d) Akta Relif Spesifik 1950 dan s 29(2) Akta Prosiding Kerajaan 1956.

Kemudiannya, usul substantif perayu untuk perintah-perintah certiorari tiba untuk perbicaraan di hadapan Ian Chin H. Hakim yang bijaksana telah menolak permohonan perayu dengan kos (lihat [1998] 2 MLJ 217). Hakim yang bijaksana mendapati bahawa, antara lainnya: (i) fasal singkiran yang terkandung dalam s 59A Akta Imigresen 1963 ('Akta tersebut') terpakai kepada perbuatan-perbuatan yang telah dilakukan, atau keputusan-keputusan yang dibuat, oleh responden pertama; (ii) fasal singkiran tidak akan melindungi keputusan-keputusan yang dicapai akibat satu kesilapan undang-undang; (iii) tidak terdapat kesilapan undang-undang dalam pembatalan permit masuk perayu; dan (iv) responden-responden tidak berada di bawah kewajipan untuk memberikan sebarang alasan kepada perayu kerana membatalkan permit masuknya. Daripada penghakiman bertulisnya, ianya jelas bahawa hakim tersebut telah juga meneruskannya atas dasar bahawa s 14 Akta tersebut terpakai kepada kes perayu.

Diputuskan, membenarkan rayuan-rayuan:

(1) Dalam keadaan-keadaan kes ini, remedi sesuatu rayuan adalah, bagi alasan-alasan yang ketara, pastinya tidak sama berkesan seperti certiorari. Selanjutnya, terdapatnya kuasa dalam sesebuah mahkamah yang memberikan kebenaran untuk memohon bagi mendapatkan certiorari untuk mengarahkan supaya kebenaran yang sedemikian hendaklah bertindak sebagai satu penggantungan. Berikutan itu, hakim yang bijaksana sesungguhnya bertindak dengan betul dalam memberikan kebenaran untuk memohon bagi mendapatkan certiorari walaupun perayu gagal untuk mengambil jalan remedi rayuan kepada Menteri (lihat ms 300H–I dan 301A).

Walaubagaimanapun, tidak terdapat sebarang halangan kepada hakim yang bijaksana tersebut memberikan satu penggantungan perbuatan responden pertama membatalkan permit masuk perayu sementara menantikan penyelesaian usul substantif untuk perintah-perintah certiorari. Berikutan itu, hakim

jelasnya telah salah dalam tidak memberikan penggantungan yang dipohon oleh perayu (lihat ms 302G). A

(2) Kebenaran seseorang yang terkilan untuk pergi ke mahkamah dan berusaha untuk mendapatkan relief, termasuk kajian semula kehakiman tindakan pentadbiran, adalah satu daripada banyak segi kebenaran peribadi yang dijamin oleh perkara 5(1) Perlembagaan Persekutuan. Walaubagaimanapun, asas kebenaran akan akses bebas kepada sesuatu badan kehakiman yang bebas untuk menebus rugi adalah secara nyatanya tak konsisten dengan suatu peruntukan dalam sesuatu statut yang cuba untuk menghalang hak itu dengan menyingkir kuasa kajian semula kehakiman. Ketidak-konsisten yang nyata ini diselesaikan dengan membenarkan satu fasal penyingkiran dalam sesuatu statut untuk mendapatkan pelalian hanya perbuatan-perbuatan pentadbiran daripada kajian semula kehakiman dan keputusan-keputusan yang tidak dipengaruhi oleh sesuatu kesilapan undang-undang. Prinsip ini namun begitu tidak menjejaskan kes-kes yang melibatkan sama ada keselamatan negara atau pun kepentingan negara. Disebabkan oleh perkara ini, s 59A tidak boleh dan tidak menghalang Mahkamah Tinggi daripada melaksanakan kuasa-kuasa kajian semula kehakiman untuk memeriksa keesahan kuasa-kuasa pentadbiran yang telah diberikan oleh Akta tersebut atas alasan substantif dan juga alasan prosedur (lihat ms 308G dan 309C). B C D E

(3) Dalam konteks sesebuah negeri Malaysia Timur, pra-syarat berkanun yang terdapat dalam s 9(1)(c) Akta tersebut mutatis mutandis menguasai pembatalan sesuatu permit masuk oleh Pihak Berkuasa Negeri. Dengan itu, responden kedua semestinya bertindak menurut s 9(1)(c) Akta tersebut ketika menjalankan kuasanya untuk mengarah responden pertama di bawah s 65(1). Setelah dengan teliti mempertimbangkan kedua-dua peruntukan tersebut (ss 9(1)(c) dan 14 Akta tersebut), ianya jelas bahawa s 14 tidak terpakai dalam keadaan semasa. Seksyen 9(1)(c) sebaliknya dengan khusus memberikan kuasa ke atas responden pertama untuk membatalkan sesuatu permit masuk yang telah diberikan kepada orang-orang yang memasuki Persekutuan Malaysia atau mana-mana kawasannya. Hakim yang bijaksana dengan itu telah tersalah arah dirinya sendiri di sisi undang-undang apabila beliau gagal memberikan sebarang pertimbangan kepada peruntukan-peruntukan s 9(1)(c) Akta tersebut (lihat ms 313F dan 315B). F G H

(4) Responden kedua telah mengambilkira dakwaan-dakwaan yang telah lapok dan yang mana hanya dapat menunjukkan bahawa perayu adalah seseorang yang mempunyai moral peribadi yang rendah. Tetapi ianya tiada perkaitan sama sekali dengan isu kemoralan awam yang mana merupakan pertimbangan yang dijadikan relevan oleh Akta tersebut bagi tujuan membatalkan sesuatu permit masuk. Dengan itu, atas keterangan responden I

sendiri, ini bukannya kes mengenai seseorang yang mana kehadirannya di Sabah adalah atau akan menjejaskan kemoralan awam (lihat ms 318G).

(5) Terdapat alasan-alasan yang telah diberikan bagi pembatalan permit tersebut. Sebaik sahaja alasan-alasan diberikan oleh seorang pembuat keputusan awam bagi keputusannya, ianya boleh disemak oleh mahkamah. Jika ianya didapati bahawa alasan-alasan yang didedahkan itu membentuk pertimbangan yang asing daripada yang ditetapkan oleh statut yang memberi kuasa, mahkamah adalah berkewajipan untuk memutuskan bahawa keputusan itu tidak menurut undang-undang. Dengan itu, alasan-alasan yang didedahkan dalam afidavit Datuk Ghulam Jelani terhadap mana responden-responden telah bergantung kepada adalah terbuka kepada penelitian. Setelah pemeriksaan, didapati bahawa permit masuk perayu telah diarahkan untuk dibatalkan kerana moral peribadinya. Oleh yang sedemikian, pertimbangan bukannya sesuatu perkara yang ditetapkan oleh 9(1)(c) Akta tersebut selaras dengan peruntukan yang mana responden kedua telah mengakui melakukan, keputusan untuk membatalkan permit masuk perayu tidak menurut undang-undang (lihat ms 319A dan 320C); *Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] MLJ 1982 diikut.

(6) Sementara negeri-negeri Malaysia Timur mempunyai hak-hak dan keistimewaan yang tertentu yang diuntukkan ke atas mereka oleh Perlembagaan Persekutuan, khususnya dalam perkara-perkara berhubung dengan imigeresen, mereka, seperti Kerajaan Persekutuan dan kerajaan mana-mana negeri Malaysia Barat, terikat oleh terma-terma Perlembagaan Persekutuan. Sesungguhnya tidak terdapat satu pun di Malaysia yang terlalu tinggi hinggakan undang-undang utama tidak dapat mengatasinya. Setiap pembuat-keputusan awam, termasuk pihak berkuasa negeri sesebuah negeri Malaysia Timur, adalah sehubungan itu berkewajipan untuk mematuhi peruntukan-peruntukan Perlembagaan Persekutuan. Ianya merupakan prinsip permulaan undang-undang perlembagaan bahawa tidak satu pun Akta Parlimen boleh memberi kuasa kepada pembuat-keputusan awam untuk bertindak bertentangan dengan undang-undang utama.

Perkara 8(1) Perlembagaan Persekutuan menyentuh sifat timbangtara dalam membuat keputusan dan mengenakan suatu kewajipan ke atas pembuat-keputusan awam untuk bertindak secara adil. Responden kedua tidak berbeza daripada mana-mana pembuat-keputusan yang lain. Ianya juga berkewajipan untuk bertindak secara adil dalam melaksanakan kuasa-kuasa yang diberikan ke atasnya oleh Akta tersebut, yang mana dalam kes ini didapati ketiadaan (lihat ms 320G–I); *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 diikut.

Per curiam:

(1) Prinsip sebenar di atas yang mana responden pertama seharusnya tidak diperlukan untuk memberikan alasan-alasan dalam sesuatu kes di bawah s 65 Akta tersebut, adalah bahawa beliau hanyalah 'amanuensis' (penyalin) responden kedua. Walaupun jika dia tidak memberikan alasan-alasan, apa yang beliau boleh katakan ialah bahawa beliau bertindak menurut arahan-arahan yang diberikan kepadanya oleh responden kedua. Oleh kerana keadaannya sedemikian, adalah menjadi tidak perlu bagi mahkamah berpaling kepada responden pertama untuk alasan-alasannya (lihat ms 325H–I).

(2) Ungkapan 'kesusilaan' yang terdapat dalam s 9(1)(c) Akta tersebut bermakna 'kesusilaan awam' dan bukannya kesusilaan persendirian atau peribadi seseorang individu. Dengan itu, kesusilaan persendirian seseorang merupakan pertimbangan yang tak relevan bagi tujuan pembatalan permit masuk orang itu di bawah s 9(1)(c) Akta tersebut (lihat ms 311B).

(3) Ianya salah untuk menghadkan kewajipan untuk memberikan alasan hanya kepada kes-kes berkaitan dengan kebenaran-kebenaran asas sedangkan autoriti-autoriti yang mendahului kes *Hong Leong Equipment* tidak mengenakan sebarang sekatan yang sedemikian. Dengan itu, kewajipan itu berlanjutan kepada kesemua kes-kes di mana hak seseorang telah secara bertentang terjejas oleh keputusan undang-undang awam (lihat ms 326G–H); *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481 tidak diikut.]

[*Editorial note*: The respondents have applied for leave to appeal to the Federal Court.]

Notes

For cases on the exercise of administrative powers, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1–50.

For cases on leave to apply for certiorari, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1040–1047.

For a case on cancellation of entry permit, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 2401.

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169 (refd)

Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481 (not folld)

A *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (refd)
Maneka Gandhi v Union of India AIR 1978 SC 597 (refd)
Merdeka University Bhd v Government of Malaysia [1982] 2 MLJ 243 (refd)
B *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789 (refd)
Mohamed Nordin bin Johan v Attorney General, Malaysia [1983] 1 MLJ 68 (refd)
Padfield & Ors v Minister of Agriculture, Fisheries and Food & Ors [1968] AC 997 (refd)
C *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 (refd)
PMNT Ramasamy Chetty v Syed Alsagoff 7 FMSLR 93 (refd)
Public Prosecutor v Dato' Yap Peng [1987] 2 MLJ 311 (refd)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308 (refd)
D *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779 (refd)
Richardson v Austin (1911) 12 CLR 463 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Rohit Pulp & Paper Mills Ltd v Collector of Central Excise, Baroda AIR 1991 SC 754 (refd)
E *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 (refd)
Sampath Kumar v Union of India AIR 1987 SC 386 (refd)
Sri Venkataramana Devaru v State of Mysore [1958] SCR 895 (refd)
State of Bombay, The, & Ors v The Hospital Mazdoor Sabha & Ors AIR 1960 SC 610 (refd)
F *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (refd)
Tan Sri Raja Khalid bin Raja Harun, Re; Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182 (folld)
G *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (folld)
Tasmania v The Commonwealth (1904) 1 CLR 329 (refd)
Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293 (refd)
Unni Krishnan v State of Andhra Pradesh (1993) 1 SCC 645 (refd)
H

Legislation referred to

Federal Constitution arts 5(1), 8(1), 121(1)
Government Proceedings Act 1956 s 29(2)
I Immigration Act 1963 ss 9(1)(c), 14, 59, 59A, 65(1), 66, 71(1)(a)
Immigration Regulations 1963 regulation 16
Indian Constitution [Ind] art 21
Markets Act 1890 [Victoria] s 25
Rules of the High Court 1980 O 53 r 1(5)

Specific Relief Act 1950 s 54(d)
Universities and University Colleges Act 1971 s 6

Appeal from: Originating Motion No K–25–29 of 1997 (High Court, Kota Kinabalu)

Muhammad Shafee Abdullah (*K Rajasegaran* with him) (*Sugumar & Co*) for the appellant in both appeals.
Zaiton Zawiyah Puteh (Senior Federal Counsel) for the first respondent.
Stephen Foo Kiat Shin (*Athmat Hassan* with him) (State Attorney General) for the second respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering judgment of the court):

Introduction

There are two appeals before us. The first is Civil Appeal No 202/97 which we shall for convenience refer to as 'the first appeal'. It is directed against the refusal by Ian Chin J, sitting in the High Court at Kota Kinabalu, to grant orders of certiorari sought by the appellant (see [1998] 2 MLJ 217). The other is Civil Appeal No 669/97 ('the second appeal') which arises out of an earlier decision in the same proceedings whereby the High Court, when granting leave to issue certiorari, refused to order that such leave do operate as a stay. Although we will say something more about the correctness of the decision that forms the subject matter of the second appeal later in this judgment, it suffices for the present to note that a resolution of the first appeal in one way or another will render the second appeal academic. We are therefore concerned in the main with the first appeal. Counsel on all sides were in agreement that this is the correct way in which to approach these appeals.

When these appeals were called on for hearing before us on 30 March 1998, counsel for the appellant informed us that he had two motions in the first appeal. The first of these motions was for a stay pending appeal. It was unopposed. We therefore granted the stay sought by the appellant pending the disposal of the first appeal. We also ordered that the costs of the first motion follow the outcome of the first appeal.

By the second motion, the appellant sought to re-amend the amended substantive motion filed before the High Court by seeking certiorari to quash the direction issued by the second respondent. The first respondent did not oppose this application. But the learned State Attorney General for Sabah did. After hearing arguments upon the second motion, we came to the conclusion that it ought not to succeed.

In our view, having regard to the substratum of the facts of this case, the amendment was unnecessary. Further, to allow the amendment at this late stage would have resulted in much procedural difficulty. Leave to apply for the fresh relief is required. We have no original jurisdiction to

grant such leave and hear the substantive motion for certiorari unless leave has been refused by the High Court in the first instance. See *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68. Lastly, the relief now sought by the re-amendment could have been applied for when the substantive motion was amended before the learned judge in the High Court. Taking into account all relevant matters, we exercised discretion against the appellant and dismissed the second motion. We also ordered the appellant to bear the taxed costs of this motion in any event.

With that we now turn to consider the merits of the first appeal.

Background

The appellant is a citizen of the Federation of Malaysia. Although a West Malaysian, he has been in Sabah since 1975. In 1985, he was admitted as an advocate of the Bar of Sabah. He has been practising law in that State ever since. He does not, however, belong to Sabah because he is not as yet a permanent resident of that State. To acquire that status, he must fulfill certain requirements under the Immigration Act 1963 ('the Act') in so far as it applies to the East Malaysian States. The relevant provision is s 71(1)(a) of the Act. It reads:

> For purposes of section 66, a citizen shall be treated as belonging to an East Malaysian State if —
>
> (a) he is or has within the preceding two years been a permanent resident in the East Malaysian State; ... .

As will be seen in a moment, it was important to the appellant that he, in the words of the Act, belongs to Sabah. It would mean that he can enter the State freely and reside there permanently. Otherwise, he would require a permit or pass under s 66 of the Act to enter Sabah.

Initially, the appellant resided in Sabah pursuant to a work pass issued under regulation 16 of the Immigration Regulations 1963. It was not permanent in nature because the pass could be revoked at any time by the respondents. It placed the appellant in an uncertain position, especially having regard to his profession. It was therefore important for the appellant to place his status on a firm footing. He tried to obtain an entry pass to enable him to reside in Sabah. Eventually, on 27 December 1995, the first respondent granted the appellant an entry pass. It was endorsed on the appellant's passport. It was valid for two years. It meant that he could reside in Sabah for two years. At the end of that period he would, according to the Act, be a person 'belonging' to Sabah.

However, on 12 November 1997, that is to say, about six weeks before the end of the two year period, the appellant was served with a Notice of Cancellation of Entry Permit dated the previous day. It is an important document. We shall therefore reproduce the material portion of it in full. It reads:

NOTICE OF CANCELLATION OF ENTRY PERMIT
Section 65(1)(c) Immigration Act 1959/63
(Amended 1997)

To: Sugumar Balakrishnan of Kota Kinabalu

Whereas you, Sugumar Balakrishnan I/C No 4548121, has been granted entry permit to reside in Sabah vide Ref No CIM/EP/21072 issued on 27 December 1995 at Kota Kinabalu.

NOW, KNOW YOU, That I, Abdullah Sani bin Sulaiman, State Director of Immigration, Sabah by virtue of the directive by the State Authority of Sabah under s 65(1) (c) of the Immigration Act 1959/63 do hereby forthwith cancel the entry permit issued to you and your presence in the state of Sabah is declared unlawful.

Upon receiving this order you are summoned to appear at the Immigration Office 6th floor, Wisma Dang Bandang, Kota Kinabalu, Sabah on or before 18 November 1997 for further action.

Signed
(ABDULLAH SANI SULAIMAN)
DIRECTOR OF IMMIGRATION,
STATE OF SABAH
Dated this: 11 November 1997

On the same day, that is, 12 November 1997, the first respondent (the Director of Immigration, Sabah) issued the appellant a special pass valid for seven days. At the end of that period, the appellant would have had to leave Sabah. Thereafter, the appellant acted with commendable speed. On 14 November 1997, he took out an ex-parte originating motion for leave to issue certiorari to quash the first respondent's act of cancelling the entry pass. The second respondent (the State authority of Sabah) was not a party to that application.

The appellant's motion for leave came up on 17 November 1997 before Suleiman Hashim J, who, acting with equally commendable speed, delivered his written judgment on the same day. The learned judge, after citing numerous authorities, came to the conclusion that leave to apply for certiorari ought to be granted despite the appellant's failure to have resort to those provisions of the Act under which the remedy of an appeal to the Minister was available.

We are in agreement with the reasons given by Suleiman Hashim J, for granting the appellant leave. In the circumstances of this case, the remedy of an appeal was, for obvious reasons, certainly not equally efficacious as certiorari. The appellant was given a mere seven days to leave Sabah. The time afforded him was hardly sufficient for him to make arrangements in respect of the practice he had built up over many years. Serious injury to the appellant's livelihood was imminent. An appeal to the Minister would not have been decided upon within the seven day period afforded the appellant. Further, the Act does not provide for a stay of a decision pending appeal to the Minister. It meant that the appellant would have to remove himself from the State of Sabah while awaiting the outcome of his appeal. As opposed to this, there is power in a court granting leave to apply

for certiorari to direct that such leave do operate as a stay. Accordingly, the learned judge was entirely correct in granting leave.

The order refusing a stay

Now, although he granted the appellant leave to apply for certiorari, the learned judge declined to stay the effect of the cancellation of the entry pass. This refusal, as we have already observed, forms the subject matter of the second appeal. After having given notice of appeal against the judge's refusal to grant a stay, the appellant urgently moved this court on 19 November 1997 for a stay. It was granted him pending the outcome of his substantive motion for certiorari.

The power to direct a stay is to be found in O 53 r 1(5) of the Rules of the High Court 1980. It reads:

> The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Court or Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Court or Judge otherwise orders.

The learned judge found himself unable to direct a stay because he found that that would amount to granting an injunction in violation of s 54(d) of the Specific Relief Act 1950 and s 29(2) of the Government Proceedings Act 1956. These two provisions read as follows:

> 54 An injunction cannot be granted —
>
> (d) to interfere with the public duties of any department of Government in Malaysia, or with the sovereign acts of a foreign Government; ... .
>
> 29 (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

With respect, we are of the view that the learned judge fell into error in equating a stay with an injunction in the environment of public law remedies. In the context of O 53 r 1(5), an order of stay has the effect of temporarily suspending the effect of a public law decision pending the outcome of certiorari or prohibition proceedings brought to challenge the validity of the particular decision.

Jowitt's Dictionary of English Law (2nd Ed) (Vol 2) at p 1701 expresses the view that 'a stay of proceedings in an action is a suspension of them'. With respect, this definition is of little assistance in a public law case such as the present. We, however, find the following passage in the judgment of SC Aggarwal J, in *Shree Chamundi Mopeds Ltd v Church of South Indian Trust Association, Madras* AIR 1992 SC 1439 at p 1444 to be more relevant:

> While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the

> restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.

By contradistinction, an injunction is directed at a party to a proceeding restraining him from doing, or requiring him to perform, a particular act. Put another way, an injunction acts *in personam*, a stay does not. It follows that as a matter of law, an order for stay is not an injunction. Both the statutory provisions relied upon by the learned judge do not therefore curtail, in any way, the power conferred upon a High Court by O 53 r 1(5).

There is one other matter which in our view calls for comment. It has to do with s 29(2) of the Government Proceedings Act 1956. That section speaks of 'civil proceedings' which expression is defined by s 2 of that Act as follows:

> 'civil proceedings' means any proceeding whatsoever of a civil nature before a court and includes proceedings for the recovery of fines and penalties and an application at any stage of a proceeding, but does not include proceedings under Chapter VIII of the Specific Relief Act 1950, or *such proceedings as would in England be brought on the Crown side of the Queen's Bench Division.* (Emphasis added.)

It is trite that when the Government Proceedings Act was enacted in 1956, the only proceedings that were brought on the Crown side of the Queens Bench Division were applications seeking prerogative relief, such as certiorari, prohibition, *quo warranto*, etc. By definition, therefore, such proceedings are not 'civil proceedings' for purposes of the Government Proceedings Act. Consequently, s 29 has no application to applications for certiorari and other prerogative relief.

What we have said thus far provide a complete answer to the reasons advanced by the learned judge for refusing a stay. In the premises, there was no impediment to the learned judge granting a stay of the first respondent's act of cancelling the appellant's entry permit pending the disposal of the substantive motion for orders of certiorari. Accordingly, the judge was plainly wrong in not granting the stay sought by the appellant.

The order refusing certiorari

Following the grant of leave by Suleiman Hashim J, and the order for a stay by this court, the appellant's substantive motion for orders of certiorari came on for hearing before Ian Chin J. In the meantime, the second respondent was added as a party to the proceedings. After a lengthy hearing, the learned judge dismissed the appellant's application with costs (see [1998] 2 MLJ 217).

The grounds upon which the judge proceeded to determine the matter against the appellant appear sufficiently in his carefully considered written judgment in which he surveyed some of the leading cases upon the subject. His conclusions may be summarised as follows. First, he found that the

ouster clause contained in s 59A of the Act applied to acts done, or decisions made, by the first respondent. Second, he agreed with the submission advanced on the appellant's behalf that the ouster clause would not protect decisions arrived at in consequence of an error of law. Third, he held that there had been no error of law in the cancellation of the appellant's entry permit. Fourth, he found any right to a hearing which the appellant may have had was excluded by the Act. Fifthly, he held that the respondents were not under a duty to give any reasons to the appellant for cancelling his entry permit.

Before us, the appellant levelled a wide ranging criticism of the reasons advanced by the learned judge for refusing certiorari. We find it unnecessary to deal with all the arguments addressed to us. Suffice that we deal with two matters which, in our view, are sufficient to dispose of the first appeal. The first is the learned judge's conclusion that there had been no error of law. The second concerns the duty upon a public decision-maker to act fairly and the application of that doctrine to the facts of the present case. However, before we enter upon a discussion of these matters, we find it necessary to deal with other points relevant to the case.

The ouster

We are in agreement with the views expressed by the learned judge upon the effect of s 59A of the Act and its applicability to the first respondent. However, having regard to the general importance of the point and the way in which the section is constructed, we consider it desirable to re-state the law upon the matter.

Section 59A reads as follows:

> (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
>
> (2) In this section, 'judicial review' includes proceedings instituted by way of —
>
> (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
>
> (b) an application for a declaration or an injunction;
>
> (c) any writ of habeas corpus; or
>
> (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

It may be difficult to envision any wider provision than this as constituting an attempt to prevent judicial review of administrative acts and decisions. Nevertheless, for reasons we will provide in a moment, s 59A cannot and does not preclude the High Court from exercising its powers of judicial

review to examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds.

The legislative intent in enacting privative clauses is to place certain public law acts and decisions completely beyond curial review. The principle of statutory construction which enables ouster clauses to protect only those acts and decisions of public decision-makers which are done or made in accordance with law is based upon, and is consonant with, the constitutional right of a person to approach the judicial arm of Government to seek redress for alleged wrongs. That the right is recognized even in England; a jurisdiction which has no written constitution; is demonstrated by the decision of the Divisional Court in *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779. We find instructive two passages from the judgment of Laws J, delivered in that case. The first of these is at pp 783–784 of the report:

> The common law does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that any one of them is more entrenched by the law than any other. And if the concept of a constitutional right is to have any meaning, it must surely sound in the protection which the law affords to it. Where a written constitution guarantees a right, there is no conceptual difficulty. The state authorities must give way to it, save to the extent that the constitution allows them to deny it. There may of course be other difficulties, such as whether on the constitution's true interpretation the right claimed exists at all. Even a superficial acquaintance with the jurisprudence of the Supreme Court of the United States shows that such problems may be acute. But they are not in the same category as the question: do we have constitutional rights at all?
>
> In the unwritten legal order of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.

The second passage appears at p 787 of the report where, after a review of several leading authorities upon the subject, the same learned judge said:

> It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right. But I must explain, as I have indicated I would, what in my view the law requires by such a permission. A statute may give the permission

> expressly; in that case it would provide in terms that in defined circumstances the citizen may not enter the court door. In *Ex p Leech* [1993] 4 All ER 539, [1994] QB 198 the Court of Appeal accepted, as in its view the ratio of their Lordships' decision in *Raymond* v *Honey* [1982] 1 All ER 756, [1983] 1 AC 1 vouchsafed, that it could also be done by necessary implication. However, for my part, I find great difficulty in conceiving a form of words capable of making it plain beyond doubt to the statute's reader that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated.

It is thus clear that the English Parliament may by express words limit or altogether preclude any person from going to court. The question then arises whether our Parliament is similarly empowered. After careful reflection we have arrived at the conclusion that that question should receive a negative response. Our reasons for taking this view now follow.

Unlike England, Malaysia has a written constitution the basic framework of which has been fashioned in language that upholds the Rule of Law. The fundamental guarantees that all persons are equal before the law and have equal protection of it (art 8(1)) and that no person shall be deprived of life or personal liberty save in accordance with law (art 5(1)) clearly demonstrate that ours is not a Government of mere humans but of laws. The wide reach of these two articles, and in particular the brooding omnipresence (to borrow the language of Bhagwati J in *Maneka Gandhi v Union of India* AIR 1978 SC 597) of art 8(1) has already been recognized by our courts. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. These cases have held that the expression 'life' in art 5(1) is not limited to mere existence but is a wide concept that must receive a broad and liberal interpretation.

In our judgment, the words 'personal liberty' in art 5(1) should be similarly interpreted. Any other approach to construction will necessarily produce an incongruous and absurd result. For, 'life' and 'personal liberty' are both equally dynamic concepts and should be treated in like fashion.

The Indian Supreme Court has, in several cases, held that the expression 'personal liberty' appearing in art 21 of the Indian Constitution is of the widest amplitude and should receive an expanded meaning. See, for example, *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 and *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645.

In *Kharak Singh*, Ayyangar J said (at p 1302) that the expression 'personal liberty':

> ... is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of art 19(1). In other words, while art 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in art 21 takes in and comprises the residue.

The Federal Constitution has entrusted to an independent judiciary the task of interpreting the supreme law and, indeed, all laws enacted by the

legislative arm of government. Hence, it is to the courts that a citizen must turn to enforce rights conferred by the Federal Constitution or other written law or existing at common law. This is a cardinal principle of constitutional law and has been stated in a number of cases. We will not go through all of them here. But we think it useful to quote from two authorities.

In *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789, Bhagwati J (later CJ) said (at p 1825):

> It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of Government are divided; the executive, the legislature and the judiciary. Under our Constitution, we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that 'the concentration of powers in any one organ may', to quote the words of Chandrachud J (as he then was) in *Smt Indira Gandhi*'s case (AIR 1975 SC 2299) 'by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged'. Take for example, a case where the executive which is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution.

In *Sampath Kumar v Union of India* AIR 1987 SC 386 at p 388, Bhagwati CJ explained the effect of the decision in *Minerva Mills* as follows:

> It is now well-settled as a result of the decision of this court in *Minerva Mills Ltd v Union of India* (1981) 1 SCR 206 (AIR 1980 SC 1789) that *judicial*

review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away, the Constitution will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution. Now a question may arise as to what are the powers of the Executive and whether the Executive has acted within the scope of its power. Such a question obviously cannot be left to the Executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field, and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law, the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of Government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence that *the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law* and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the Rule of Law. *The power of judicial review is an integral part of our constitutional system* and without it, there will be no Government of laws and the Rule of Law would become a teasing illusion and a promise of unreality. (Emphasis added.)

The views expressed in the foregoing cases are not only entitled to great weight but may be safely adopted by our courts. Apart from being plain common-sense, they were made in respect of a written constitution the basic fabric of which resembles that of our Federal Constitution. In saying this, we do not overlook the amendment to art 121(1) of the Federal Constitution whereby the words 'judicial power of the Federation' were deleted on 10 June 1988 by Act A704. However, in accordance with well-established principles of constitutional interpretation, the deletion does not have the effect of taking away the judicial power from the High Courts.

The Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, upon high authority it has been held that despite the omission, the provisions in that document:

> ... manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature (per Lord Pearce in *Liyanage v The Queen* [1967] 1 AC 259 at p 287).

The Indian Constitution also does not make mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka. See *Minerva Mills Ltd v Union of India*. Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers between the three arms of Government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely, with the judiciary.

Based upon what we have said thus far, we are of the view that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art 5(1) of the Federal Constitution. Were it otherwise, the protection afforded by arts 5(1) and 8(1) of the Federal Constitution will be illusory and the language of the supreme law no more than high sounding words of no practical significance.

The fundamental liberty of free access to an independent judiciary to obtain redress is apparently inconsistent with a provision in a statute that seeks to preclude that right by ousting the power of judicial review. This apparent inconsistency is resolved by permitting an ouster clause in a statute to immunize from judicial review only those administrative acts and decisions that are not infected by an error of law. Such an approach is in accordance with the well-established principle of legislative interpretation known as the rule of harmonious construction whereby the court, instead of striking down a statutory provision altogether as being unconstitutional, prefers to permit the impugned provision to operate in harmony with the Constitution. (see *Tasmania v The Commonwealth* (1904) 1 CLR 329, 357; *Sri Venkataramana Devaru v State of Mysore* [1958] SCR 895 at p 918).

So far as immunization of acts and decisions under the Act are concerned, we would merely repeat what was said in one of the judgments delivered by this court in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at p 342:

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no

A jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. ...

Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause B however widely drafted.

We must, however, enter a cautionary note before leaving the topic under present discussion. Nothing we have said thus far is to be taken as affecting cases that involve either national security or national interest. It is obvious that special consideration must be given to those cases as a matter of C judicial policy (see, for example, *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293). In such cases, the court declines to intervene save, perhaps, on the limited procedural ground excepted by s 59A because the subject matter in respect of which judicial review is sought is one that is best left to the Executive arm of the Government to D deal with according to the exigencies of the particular case and based upon information that is exclusively available to it. For reasons that will become apparent later, the present instance is one that does not evidentially fall within these special categories of cases.

Some relevant sections of the Act

E

In order to properly appreciate the submissions made in this appeal, it is necessary to refer to and deal with certain provisions of the Act cited to us during argument. They are as follows.

First, s 9(1)(c) which reads:

F (1) Notwithstanding anything contained in this Act or in any subsidiary legislation made under this Act, the Director General may — ...

(c) cancel any Permit at any time by writing under his hand, if he is satisfied that the presence in, or entry into, Malaysia of the holder of any Permit is, or would be, prejudicial to public order, public security, public health or morality in Malaysia or any part thereof.

G

There are two comments we would make upon this provision.

First, it is noteworthy that the section employs, in para (c) the words 'if he is satisfied' to predicate the exercise of the power of cancellation. Upon well-established authority, the satisfaction to which the section H refers is objective and not subjective.

In *Merdeka University Bhd v Government of Malaysia* [1982] 2 MLJ 243, it became necessary for the former Federal Court to consider a similar formula appearing in s 6 of the Universities and University Colleges Act 1971. Suffian LP, who delivered the judgment of the court said (at p 246):

I

... [A]dministrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of

> unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable ... .

Second, it is to be observed that the section uses the word 'morality' and not 'public morality'. The question that has assumed much importance in the present instance is what Parliament intended when it used the word 'morality' in s 9(1)(c) of the Act. Did it intend to confine itself only to public morality? Or did it intend to go much further and include private or personal morality as well? Since the legislative intent of Parliament is unclear from the language it has employed, we must resolve the ambiguity in accordance with well settled principles of statutory construction.

We refer, of course, to the time honoured guideline of contextual interpretation housed in the maxim *noscitur a sociis* which was explained by Gajendragadkar J, in *The State of Bombay & Ors v The Hospital Mazdoor Sabha & Ors* AIR 1960 SC 610 at p 613 as follows:

> This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in *Words and Phrases* (Vol 14) at p 207:
>
> > 'Associated words take their meaning from one another under the doctrine of *noscitur a sociis*, the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim *ejusdem generis*.'
>
> In fact, the latter maxim 'is only an illustration or specific application of the broader maxim *noscitur a sociis*'. ... It must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied.

In *Rohit Pulp & Paper Mills Ltd v Collector of Central Excise, Baroda* AIR 1991 SC 754 at p 762, Ranganathan J, when delivering the judgment of the Indian Supreme Court observed that the principle of construction housed in the maxim *noscitur a sociis* 'has been applied in a number of contexts in judicial decisions where the court is clear in its mind that the larger meaning of the word in question could not have been intended in the context in which it has been used'.

In *Richardson v Austin* (1911) 12 CLR 463, the High Court of Australia was called upon to interpret the phrase 'or other public passages or places' appearing in s 25 of the Markets Act 1890 (Victoria). It was argued for the complainant that the word 'places' meant 'any place, whether public or private'. The court rejected that contention and held that quite apart from the maxim *noscitur e sociis*, mere grammatical construction led to the

A conclusion that those words meant 'or other public passages or *public* places' (see Griffith CJ at p 468).

Adopting the process of interpretation that has thus commended itself to us, we have come to the conclusion that the expression 'morality' appearing in the foregoing provision means 'public morality' and not the B private or personal morality of an individual. We are therefore in agreement with the concession made during argument by Dato' Zaiton Zawiyah Puteh, learned senior federal counsel who appeared for the first respondent, that the private morality of a person is an irrelevant consideration for purposes of cancellation of that person's entry permit under s 9(1)(c) of the Act.

C The next provision that calls for consideration is s 59 of the Act. It reads:

> No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him D in respect of any matter under this Act or any subsidiary legislation made under this Act.

It is a settled principle of public law that, absent a constitutional guarantee in that regard, Parliament may by clear words exclude the operation of the rules of natural justice. If authority is required in support of this proposition, E it is to be found in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 211, where Abdoolcader J (as he then was) said:

> The legislature can by clear words exclude the principles of natural justice *in the absence of specific constitutional guarantees.* In an appeal from New F Zealand, the Privy Council approved of the idea that natural justice could be effectively excluded by a legislative code in *Furnell* v *Whangarei High Schools Board* [1973] AC 660 at p 679 which concerned the disciplinary code for New Zealand government teachers. Charges against a schoolteacher were investigated by a sub-committee which reported to the high school's board. Neither the sub-committee nor the board gave the schoolteacher an G opportunity of making representations but he was suspended from teaching pending consideration and decision by the teachers' disciplinary board. The majority opinion held that the legislative code was not unfair and refused a writ of prohibition, stating (at p 679) that it is not 'the function of the court to re-draft the code' and referring with approval to the decision of the High Court of Australia in *Brettingham-Moore* v *Municipality of St Leonards* (1969) H 121 CLR 509 at p 524 which held in effect (at p 524) that it is not for the court to amend the statute by engrafting upon it some other provision which it might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material. (Emphasis added.)

What the rules of natural justice broadly entail is to be found in the advice I of the Judicial Committee delivered by Lord Denning in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 at p 172:

> In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua* and *Audi alteram partem*. They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations.

Thus, it may be seen from the language in which s 59 has been couched that it is the intention of Parliament to do away with the audi alteram partem limb of the rules of natural justice in the circumstances postulated by that section. The rules of natural justice, however, are a flexible concept whose categories are not closed. (See *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308.) Further, they merely form part of a much wider doctrine, namely, the duty to act fairly. Whether s 59 has the far reaching consequence of excluding other facets of the wider doctrine, which the learned judge said it has, is a matter that will be dealt with later in this judgment.

We may add that we are happily spared the task of having to deal with the question whether the exclusion of the audi alteram partem rule, in the circumstances of the present case, contravenes arts 5 and 8 of the Federal Constitution, since the point was not argued before us. We say 'in the circumstances of the present case' advisedly because a written law may be held to be constitutional in certain circumstances and yet be declared unconstitutional when applied to a different set of circumstances, a proposition accepted by Abdoolcader SCJ (forming the majority of the Supreme Court) in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 at p 317, where he said:

> In an advisory opinion under art 143 of the Constitution of India in *Re the Special Courts Bill 1978* AIR 1979 SC 478, Chandrachud CJ (at pp 508–510) reformulated the principles in relation to the equivalent of our art 8, and in doing so stated, inter alia, *the principle that whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of the provision equivalent to our art 8 must be determined in each case as it arises, for no general rule applicable to all cases can safely be laid down, and a practical assessment of the operation of the law in the particular circumstances is necessary.* (Emphasis added.)

The third provision of the Act that is relevant in the present instance is s 65(1)(c) which reads:

> (1) In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State authority, being directions —
>
> (c) requiring him to ... cancel any Permit, Pass or Certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.

A It was argued for the appellant in the court below that despite the express words of this provision, the first respondent retained a discretion whether to comply with a direction given to him by the State authority, the second respondent before us. This argument was repeated before us and supported by Dato' Zaiton, the learned senior federal counsel. The learned judge rejected this submission. We are in agreement with the learned judge. To B accept the contention in favour of there being a residual discretion in the first respondent would be to fly in the face of the express words of the section.

We are also of the view that the learned judge was right in the way in which he approached the exercise of power by the first respondent when C he said (at p 230C):

> The act or decision of the director (the first respondent in the appeal) following a direction of the state authority is really the act or decision of the state authority as the director has no choice but to carry out the direction. Therefore, any challenge to the act of the director under s 65 is in fact a D challenge to the decision or act of the state authority ... .

Section 65(1) does not expressly set out the circumstances in which the State authority may direct the first respondent to exercise his power of cancellation. Does this mean that the State authority has untrammelled power under the Act to direct the cancellation of an entry permit? With E respect, we do not think that Parliament intended to confer such power upon the State authority of an East Malaysian State. That legislative intent points in quite the opposite direction is evidenced by the opening words of s 65(1). It says, 'In exercising his powers under Parts I to VI', thereby referring to the sections appearing in those six parts of the Act. Among these is s 9(1)(c) which circumscribes the power of cancellation.

F It follows that in the context of an East Malaysian State, the statutory pre-conditions appearing in s 9(1)(c) mutatis mutandis govern the cancellation of an entry permit by the State authority. In the context of the present case, it means that the second respondent (the State authority of Sabah) could only direct the first respondent to cancel the appellant's G entry permit after being objectively satisfied that one or more of the grounds set out in s 9(1)(c) existed. We are therefore in agreement with the concession made before us by the learned senior federal counsel that the second respondent in giving directions to cancel an entry permit under s 65(1) must act within the scope of s 9 of the Act.

H Having made these observations, we will now deal with the two issues upon which this appeal falls to be determined.

Was there an error of law?

In the court below, the appellant argued his application on the footing that I his case came within s 14 of the Act. From his written judgment, it is clear that the judge also proceeded on the basis that s 14 of the Act applied to the appellant's case. For completeness, we produce that section below:

(1) Where the holder of any Permit seeks to enter Malaysia accompanied by any child whose name is not endorsed upon the Permit under section 12 and who is not otherwise entitled to enter Malaysia under this Act, the Director General may cancel the Permit issued to that person.

(2) Where, upon the arrival in Malaysia of any person to whom a Permit or Certificate has been issued, the Director General is satisfied, as a result of inquiries made under section 24 or 26, or from other information, that the Permit or Certificate was issued as a result of any false representation or concealment of a material fact the Director General may cancel the Permit or Certificate.

(3) Where at any time, during the period of validity of any Permit or Certificate, the Director General is satisfied that the holder of the Permit or Certificate is a prohibited immigrant, the Director General shall cancel the Permit or Certificate.

(4) Where any person has entered Malaysia by virtue of a Permit or Certificate, and the Director General is satisfied —

(a) that any material statement made in or in connection with the application for that Permit or Certificate was false or misleading; or

(b) that the person is a prohibited immigrant,

the Director General may declare at any time after the date of the entry, that the presence of that person in Malaysia is unlawful.

(5) On making any cancellation under subsection (2) or (3) or on making any declaration under subsection (4) the Director General shall, by notification, which, if the address of the person is known shall be sent to him at that address and otherwise shall be published in such manner as the Director General deems fit, inform the person affected thereby of the grounds on which the cancellation or cancellation or declaration has been made and the person may appeal against the declaration, as the case may be, within such time and in such manner as may be prescribed, to the Minister, whose decision shall be final.

However, the learned judge's note of the proceedings before him shows that the learned State Attorney General, during his argument, drew the court's attention to s 9(1)(c) of the Act as the relevant and applicable provision. There is also recorded by the learned judge a statement by the learned State Attorney General to the effect that he was relying on s 9(1)(c).

It therefore comes as a surprise that the learned judge decided the case before him based entirely on s 14 of the Act without assigning any reasons for rejecting the State Attorney General's submission that s 9(1)(c) was the applicable provision. If he did so only because of what the appellant had said (and a reading of the learned judge's judgment certainly conveys that impression) then he was plainly wrong. For no court is bound to decide a controversy upon an erroneous concession of law made by one of the disputants before it, more so when a question of statutory interpretation is involved. The most odd of results would follow if a contrary rule is to be applied. As Thorne J observed in *PMNT Ramasamy Chetty v Syed Alsagoff* 7 FMSLR 93 at p 120:

> [T]his court should disregard the admission [of counsel] on the grounds that it was an erroneous statement of law no more binding or authoritative than many other bizarre propositions of law to which courts have to listen.

We have already held that the second respondent must act in accordance with s 9(1)(c) of the Act when exercising its power to direct the first respondent under s 65(1). Now, having carefully considered the two provisions (ss 9(1)(c) and 14 of the Act), we are entirely in agreement with the submissions of Dato' Zaiton and the learned State Attorney General that s 14 has no application in the present instance. It is a provision that applies to immigrants generally. Section 9(1)(c) on the other hand specifically confers power upon the first respondent to cancel an entry permit granted to persons entering the Federation of Malaysia or any part thereof. In any event, we have it upon the authority of the learned State Attorney General that those instructing him acted pursuant to s 9(1)(c) of the Act when cancelling the appellant's entry permit. We are therefore of the view that the learned judge misdirected himself in law when he failed to have any regard to the provisions of s 9(1)(c) of the Act.

When dealing with the question whether the decision to cancel the appellant's entry permit was vitiated by an error of law, the learned judge confined himself to the narrow question posed by counsel for the appellant. He then appears to have looked for some specific misdirection of law on the part of the first respondent in the context of ss 14 and 65 of the Act. The following two passages in the judgment demonstrate the approach taken by learned judge.

First, at p 231A–B:

> It will recalled that the director acted to cancel the entry pass after he was directed to do so by the State authority under s 65. Mr Shafee contended that the director can only cancel the entry permit under s 14 and can only make the declaration under s 14(4) and since the director acted, instead, under s 65, he had committed an error of law.

Second at pp 236I–237I:

> Section 14 relating to the cancellation of entry permit provides for only the Director General to act and for an appeal against his decision to the Minister. Section 64(3) made provision for a director for each of the East Malaysian states and for them to exercise the powers exercisable by the Director General. This is one of the modifications to be taken into account when applying s 14 to Sabah. Another modification is that the director must comply with the direction of the state authority that requires him to cancel an entry permit. Pausing here, it is pertinent to ask whether Parliament intended that the director should conduct the enquiries provided under s 14 before he complies with the direction? Another pertinent question is does Parliament intend to allow the director to defy the direction if after enquiries he somehow forms the view that the entry permit should not be cancelled? Before answering those questions, it must be borne in mind, firstly, that Sabah had the right to refuse admission to its state except for, as examples, certain category of persons like judges, civil servants and ministers. Secondly, any person, including a Malaysian, who is not of Sabah origin is to be

regarded as a non-citizen, that is, an alien (s 66(3)). Thirdly, all this came about as a condition for Sabah joining in the formation of Malaysia. A

As for the question of whether Parliament had intended an enquiry be conducted before the director complied with the direction of the state authority, the answer is surely no. That requirement of s 14 had been modified or over-ridden by the right of the state authority to direct the cancellation of the entry permit. No such power was given to the State B authority under s 14 because there was no such entity then and therefore it could not have been intended then that such an entity be subject to the requirement of making enquiry before the cancellation of the entry permit. The entity of the state authority is the creation of Pt VII of the Act pursuant to the Malaysia Agreement. Part VII is to give effect to the right of the state over immigration matters and contains the all new provision for the state C authority to decide to cancel an entry permit and for the director to carry out its decision. There is no provision that the state authority must conduct an enquiry before deciding on cancelling an entry permit before the coming into existence of Pt VII and no new provision was made for an enquiry under Pt VII. Therefore, it is my view that no inquiry, whether by the director or by the state authority, is intended by Parliament. If the whole D purpose of Pt VII was to protect the East Malaysian states over immigration matter, then it is unthinkable that Parliament would intend that those all important matters, in fact, they form one of the bases for Sabah agreeing to the formation of Malaysia, could be whittled away by a construction that allowed a director to defy the direction of the state authority which surely would be the effect if the requirement of an inquiry is imposed. Therefore, E to accede to the construction urged by Mr Shafee would have the effect of making the special provisions of Pt VII which gives protection to the East Malaysia states on immigration matters illusory because that construction would result in the State authority not being able to initiate any action to cancel any entry permit. As for the answer to the second question, it is clear that Parliament had intended that the director should follow whatever F direction given by the state authority under s 65.

With respect, we find this too narrow an approach. An error of law in the context of public law is a broad concept. It is not limited to a mere misconstruction by a public decision-maker of the provision of the empowering statute. What public law classifies as an 'error of law' has G already received curial treatment and we find it sufficient to quote the following passage from one of the judgments delivered by this court in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (at p 342):

> It is neither feasible nor desirable to attempt an exhaustive definition of H what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of I the general law.

In this context, we may mention that the learned judge does not appear to have evaluated the affidavit evidence presented to him. Indeed, it is apparent

A from his judgment that he did not address his mind at all to the evidence led before him. This in our view constitutes a serious non-direction on the part of the learned judge.

By reason of what we have said thus far, we are of the view that the validity of the cancellation of the appellant's entry permit should be B examined against s 9(1)(c) of the Act, having regard to the criteria postulated by that subsection and the matters that were taken into account by the respondents when making the impugned decision. We have earlier in this judgment produced s 9(1)(c) which contains the relevant considerations that circumscribe the exercise of the power to cancel an entry permit conferred by that section. We have also observed that an entry permit may C be cancelled upon grounds of public morality.

The considerations that were taken into account when exercising the power to cancel the appellant's entry permit in the present case appear sufficiently in paras 5 to 16 of the affidavit of Datuk Ghulam Jelani bin Khanizaman, the Secretary of Internal Affairs and Research of the Chief D Minister's Department, affirmed on 18 December 1997. These paragraphs read as follows:

> 5 Since 1980, the State Government has received several petitions from Mr Richard Ng of Kota Kinabalu dated 12 March 1990, from Mr Jus bin Balitus @ Stanislaus of Penampang dated 10 April 1990 and from Mr Muthu Sagaran of Kota Kinabalu dated 10 April 1990, alleging E that the applicant had one time or another caused the break-up of their respective families. Copies of the said petition are now shown to me and annexed hereto and marked as exhibits 'GJK-2', 'GJK-3' and 'GJK-4' respectively.
>
> 6 The said allegations were communicated to the Applicant to show F cause by the State Attorney General's letter dated 14 April 1990. A copy of the said letter is now shown to me and annexed hereto and marked as exhibit 'GJK-5'.
>
> 7 The applicant married one Theresa Kinson at the St Michael's Church, Penampang, on 27 November 1976. A copy of the marriage certificate dated 27 November 1976 is shown to me and annexed hereto and G marked as exhibit 'GJK-6'.
>
> 8 However, he was converted to Muslim on 21 July 1980. A copy of the letter dated 8 February 1995 from the applicant enclosing a letter from Majlis Ugama Islam Sabah confirming the conversion is shown to me and annexed hereto and marked as exhibit 'GJK-7'. His then wife Theresa Kinson was not converted with him.
>
> H 9 On 2 June 1986, he married one Shanti Satkuna Nathan @ Shanti Nathan (the ex-wife of Mr Muthu Sagaran) according to Muslim rites of marriage. A copy of the marriage certificate dated 5 June 1986 is shown to me and annexed hereto and marked as exhibit 'GJK-8'.
>
> 10 While being a Muslim and still married to Shanti Satkuna Nathan @ I Shanti Nathan, the applicant continued to cohabit with Theresa Kinson (who is a non-Muslim) and out of such cohabitation, three children, namely Kelly Darren Balakrishnan (born on 14 June 1981), Jason Daniel Balakrishnan (born on 21 June 1986) and Elsa Sugurmarie S Balakrishnan (born on 12 February 1988) were born. Copies of the

birth certificates are shown to me and annexed hereto and marked as exhibits 'GJK-9', 'GJK-10' and 'GJK-11'. A

11 I am advised by my solicitor and verily believe such cohabitation is contrary to the religion of Islam.

12 The applicant has since divorced Shanti Satkuna Nathan @ Shanti Nathan and married his present wife Bibi Gulshon, who is a Muslim. B

13 Owing to the above reasons, the applicant's application for permanent stay in Sabah had been consistently rejected by the State Government even though the State Government has no objection to the respondent granting him a work pass.

14 Thus, the applicant had been working in Sabah under a work pass until 27 December 1995 when an entry permit was granted to him by the C respondent based on a hand-written footnote purportedly given by the former Chief Minister, Datuk Sri Panglima Mohd Salleh bin Tun Said, on a letter of appeal dated 21 December 1995 submitted to him by the applicant at Sri Gaya, Kota Kinabalu, the official residence of the Chief Minister. The said letter of appeal was not sent through official channel and as such no copy of the said letter is found in the official file D of the State Government. A copy of the said letter provided by the respondent is now shown to me and annexed hereto and marked as exhibit 'GJK-12'.

15 Thus, there was no official communication by the State Authority to the respondent approving the applicant's application for permanent stay in Sabah and as such there is no official record in our file that the E applicant was granted an entry permit until I found out from the respondent sometime in May 1997.

16 In the circumstances, based on the matters as deposed to above, I issued a direction dated 10 November 1997 under s 65(1)(c) of the said Act directing the respondent to cancel the entry permit issued to the applicant on 27 December 1995 as the applicant's continuous F presence in Sabah is prejudicial to the morality in Sabah. A copy of the said direction dated 10 November 1997 is now shown to me and annexed hereto as exhibit 'GJK-13'.

The foregoing paragraphs make it clear that the second respondent took into account allegations that are stale and which only tend to show that the G appellant is a man of poor personal morals. But they bear no relevance whatsoever upon the issue of public morality which is the consideration the Act has made relevant for purposes of cancelling an entry permit. On the respondents' own evidence, therefore, this is not a case of a person whose presence in Sabah is, or would be prejudicial to public morality. H

To this, the learned State Attorney General has two responses. His first response is that the second respondent is under no duty to provide reasons for directing the first respondent to cancel the appellant's entry permit because of 59 of the Act. He says that no inference could have been drawn against the second respondent if it chose not to provide reasons for doing what it did. It is therefore irrelevant if the second respondent gives I bad reasons for directing the first respondent to cancel the appellant's entry permit. With respect, we are unable to accede to these submissions.

Assuming, but not deciding for the present, that there is no duty upon the second respondent to give reasons for directing a cancellation of the appellant's entry permit, the argument made at the Bar overlooks the fact that reasons have indeed been given in this case. Once reasons are given by a public decision-maker for his decision, they may be examined by the court. And if it is found that the reasons disclosed constitute considerations foreign to those stipulated by the empowering statute, the court is obliged to hold that the decision is not in accordance with law. As Salleh Abas LP said in *Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 (at p 188):

> [I]f facts are furnished voluntarily, exhaustively and in great detail as in this case for consideration of the court it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion.

With respect, therefore, the approach suggested by the learned State Attorney General appears to us to resemble the physically impossible task of trying to pass through a brick wall by pretending that it does not exist.

The second answer advanced by the learned State Attorney General is that he had, in any event, informed the learned judge that the second respondent was prepared to abandon all matters set out in paras 5 and 6 of the affidavit of Datuk Ghulam Jelani bin Khanizaman. He drew our attention to the note of proceedings recorded by the learned judge which refer to the appellant's application to strike out certain objectionable parts of the aforesaid affidavit. The relevant portion of the note reads as follows (Appeal Record, pp 88–89):

> Foo: Should indicate the parts of the affidavit which they find objectionable.
>
> Shafee: Objectionable parts of affidavit are para 5, 6, 10, 11 and 13.
>
> Foo: Prepared to have 5 and 6 dropped but will still rely on 10, 11 and 13.
>
> Court: I will deal with the admissibility of paras 10, 11 and 13 when the substantive motion is argued. I come now to the application for amendment.

Based on this note, the learned State Attorney General has argued that it is not open to the appellant to rely on the material appearing in paras 5 and 6 of Datuk Ghulam Jelani's affidavit. He says that there is accordingly no available material upon which the second respondent's decision may be criticised.

We however find that two matters of factual importance stand in the way of the arguments advanced in support of the second response. In the first place, we note that this is not a case where the offending paragraphs in an affidavit were expunged. Indeed, we find that despite this exchange between counsel appearing on the foregoing note, appellant's counsel, without any protest from any quarter, did in fact refer to and make submissions upon the matters deposed to in paras 5 and 6 of the affidavit in question. (See p 94 of the Appeal Record). Secondly, it does not appear

from the written judgment that the learned judge made any ruling upon the admissibility of paras 10, 11 and 13 of Datuk Ghulam Jelani's affidavit. As such it would be quite wrong to now preclude the appellant from merely repeating before us what he had already put forward in the court below in terms of criticism of the evidence already available. In the premises, we once again find ourselves unable to agree with the arguments of the learned State Attorney General upon the point under discussion.

In logical sequence, then, we arrive at the conclusion: (1) that the reasons disclosed in Datuk Ghulam Jelani's affidavit are open to curial scrutiny; (2) that upon examination it is found that the appellant's entry permit was directed to be cancelled because of his private morals; (3) that such consideration is not one of those prescribed by s 9(1)(c) of the Act pursuant to which provision the second respondent admittedly acted; and (4) that in the result the decision to cancel the appellant's entry permit was not in accordance with law.

The reasons we have thus far given are in themselves sufficient to grant the orders of certiorari sought in the appellant's amended motion of 20 November 1997. But we find that there is a further ground upon which the appellant is entitled to succeed.

Duty to act fairly: general observations

The passages in the judgment of the learned judge earlier quoted make plain that he was of the view that s 65 is a special provision uncontrolled by any of the other provisions in the Act. It must then logically follow that a State authority of an East Malaysian State has unfettered power to regulate immigration within its borders. The judgment when read as a whole certainly conveys the impression that such a conclusion appealed to the judge as being correct in law. Regrettably, however, we must enter our most vigorous dissent against such a proposition.

While the East Malaysian States have certain rights and privileges reserved unto them by the Federal Constitution, particularly in matters pertaining to immigration, they, like the Federal Government and the government of any of the West Malaysian States, are bound by the terms of the Federal Constitution. Indeed, there is none within the shores of Malaysia who is ever so high that the supreme law is not above him. Every public decision-maker, including the State authority of an East Malaysian State is accordingly under a duty to observe the provisions of the Federal Constitution. And it is an elementary principle of our constitutional law that no Act of Parliament may authorize a public decision-maker to act contrary to the supreme law.

Article 8(1) of the Federal Constitution strikes at the heart of arbitrariness in public decision-making and imposes a duty upon a public decision-maker to act fairly. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*. The second respondent before us is no different from any other public decision-maker. It too is under a duty to act fairly in exercising the powers conferred upon it by the Act.

Until very recently, it was thought that the duty to act fairly was confined to affording only procedural fairness in a public decision-making process. The proposition was expressed in the time-honoured formula: judicial review is concerned with the decision making process and not with the decision itself.

The fallacy of this approach was exposed by the landmark decision of the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor*. In a judgment that broke new ground, Edgar Joseph Jr FCJ, after a careful analysis of the authorities that hold the field in this area of the law, concluded that public law recognizes challenges not only on procedural, but also on substantive grounds. His Lordship said (at pp 186H–188I):

> It is often said that Judicial Review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of *procedural impropriety*.
>
> But Lord Diplock's *other* grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for *process*, but also for *substance*.
>
> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
>
> > 'By "illegality" as a ground for Judicial Review I mean that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a Court's reversal of a decision by ascribing it to an inferred though unidefinable mistake of law by the decision-maker. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.'

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

Lord Diplock's first ground for challenge, namely, 'illegality', involves insisting that the authority or body whose decision is being impugned has kept strictly within the perimeters of their powers. A good example of this is the case of *Westminster City Council v Great Portland Estates Plc* [1985] AC 661, an ultra vires case, involving judicial construction of the Town and Country Planning Act 1971. The question for decision was whether the Act permitted the relevant authorities, by resort to their development plans, to support the retention of traditional industries or was the ambit of the Act such as to permit only 'land use' aims to be pursued? It was held that 'the character of the use of the land, not the particular purpose of a particular occupier' was the concern of planning and, therefore the authority, could not be seen to favour any particular occupant or class of occupant. By thus confining the relevant authority strictly to the four walls of the powers conferred upon them by the Act, the court was involved in the exercise of reviewing the impugned decision for *substance* and not just process.

Lord Diplock's second ground for challenge, namely, 'irrationality' recognizes a different route whereby the substance of a decision may be reviewed by the Courts. By this means, Lord Diplock made it clear that despite being legal, that is to say within the powers conferred, a decision may nevertheless, be struck down, for being contrary to *substantive principles*. In the words of Lord Diplock, 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.

In this regard, the case of *Hall & Co Ltd v Shoreham-By-Sea UDC & Anor* [1964] 1 All ER 1, a planning case, affords a good illustration of how the Courts in the United Kingdom do in practice review a decision for substance even though it may comply with the legislative scheme. The defendant had granted the plaintiffs planning permission subject to conditions that required them to construct a road on their land and dedicate its use to the public. No compensation was payable to them for the loss of the land to be used for the road. Under town and country planning law, a local authority may in granting planning permission, impose such conditions as it may think fit. The Court struck down the condition, one of the grounds being that the condition was void for unreasonableness. On the one hand, while viewed from a traffic engineering point of view, the defendant's object was 'perfectly reasonable', but on the other hand, the course they adopted was 'utterly unreasonable'. In effect, the court had examined the decision for *substance*, and held that the imposition of the condition was an abuse of power and unlawful. It is implicit in this decision that the Court was indirectly enforcing the fundamental civil right to be compensated adequately for property compulsorily acquired.

A Lord Diplock's third ground of Judicial Review — procedural impropriety which involves reviewing a decision for process — requires no comment, having regard to the topic I am now addressing.

Turning to Lord Diplock's fourth ground of Judicial Review — namely, proportionality — there are cases in the United Kingdom which point to the conclusion that even where EEC law is not applicable, such a principle has B been recognized as a general principle of English law, and when applied, it enables the Court to review an impugned decision for substance as well as process. In this context, I have in mind cases such as *R v Barnsley MBC, ex p Hook* [1976] 1 WLR 1052; *Wheeler & Ors v Leicester City Council* [1985] AC 1054 and *London Borough of Brent, ex p Assegai* The Times, 18 June 1987. (Emphasis added.)

C These views of his Lordship were subsequently affirmed by a unanimous Federal Court in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 in the following terms (at p 799):

In our judgment, the correct approach to the '*Wednesbury* unreasonableness' and the proportionality tests is that adopted by Lord Denning MR in the D Court of Appeal in *Evans*. We therefore find the criticism of his approach by the House to be unwarranted. The continued reluctance of English courts to come to grips with the practical realities of applying the '*Wednesbury* unreasonableness' test (see, for example, *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696) in no way deters us from accepting as correct the view expressed by Edgar Joseph Jr FCJ in *Rama Chandran*. An E examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, does not, in our view, occasion an abuse of judicial power by an unjustified or unauthorized assumption of appellate power in certiorari proceedings. (Emphasis added.)

F We may add that the principle established by *Rama Chandran* has already been applied by this court in other cases. See, eg *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489.

The result of the decision in *Rama Chandran* and the cases that have followed it is that the duty to act fairly is recognized to comprise of two G limbs: procedural fairness *and* substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision-maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing H complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance.

Although the learned judge referred to *Rama Chandran* in his judgment, he did not, as will appear in a moment, sufficiently appreciate the wealth of public law jurisprudence flowing from the majority judgments in that I case. Indeed, the learned judge entirely missed the issue central to the case and canvassed at length before him by the appellant's counsel. It therefore behoves us to address the point fully and deal with the application of the doctrine of fairness to the present instance.

Duty to act fairly: procedural fairness

We are fully conscious that this is a case where it is not strictly necessary for us to deal with the applicability of the procedural limb of the doctrine to the present instance. Nevertheless, we find it desirable to do so because of the views expressed by the learned judge upon the duty to give reasons. This is how he dealt with the point (at pp 242F–243D):

> Mr Shafee submitted that because no reasons were given for the cancellation the decision to cancel must be irrational and the court ought to proceed to consider the materiality or relevance of the failure to provide reasons. Learned counsel cited *Minister of Human Resources & Ors v National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and another appeal* [1997] 3 MLJ 377 (CA). The facts of that case are totally different from the present and the subject matter there concerns the Trade Union Regulations 1959. Factually, it is of no help to the applicant's case. As for the cited statement of law, it is also of no help. The Court of Appeal there held that the absence of reasons for a decision where there was no duty to give them could not of itself provide any support for the suggested irrationality of the decision.
>
> It was also submitted that the present case is not one which involves public policy, national interest, public safety or national security and the court is therefore, submitted learned counsel, entitled to carry out an objective examination of the factual matrix presented to it to ascertain whether a reasonable tribunal similarly circumstanced would have come to the decision as the director did, citing in support *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 (FC), *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 (SC) and *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 (CA). *None of those cases are concerned with the right of the East Malaysian states over immigration matters and the right of the Executive, that is the state authority, to cancel an entry permit. Therefore, they cannot be relied on for deciding the questions herein.* As for the question of public policy I am unable to agree that this case is not concerned with it. It is very much so because it involves the manner in which a state executive or the state authority goes about overseeing immigration matters. It is unthinkable for the court to venture into making decision as to when and whom should be issued an entry permit and as to when and why an entry permit should be cancelled. Those are surely matters of policy which are best left to the executive. Furthermore, since the director must and had acted in compliance with the direction of the state authority as required by s 65, there is no question of giving any reason because he has no choice of action and it should be apparent to the applicant that the director had acted under direction. *Also, by virtue of ss 59 and 59A, the director is not obliged to give any reasons.* (Emphasis added.)

Upon these passages, we have the following comments to make.

First, we are, with respect, unable to agree with the approach adopted by the learned judge. It is too narrow and restrictive. He treats *Rama Chandran* and the other cases merely as decisions upon their own facts. They are not. They are cases that lay down important principles of public law and apply them to particular fact patterns. They are authority for the

proposition that judicial review of a public law decision is not confined to procedural fairness but includes substantive fairness.

Second, the learned judge seems to have misunderstood his role in judicial review proceedings. All that he was asked to do was to review the fairness of the second respondent's decision to cancel the appellant's entry permit. If he came to the conclusion, having regard to the objective facts before him, that the decision was fair and reasonable he was entitled to say as much and refuse the application. On the other hand, if he came to quite the opposite conclusion, it was his plain duty to quash the act of cancellation. Unlike *Rama Chandran* and *Harris Solid State*, here is not a case where the court was moved to substitute its decision for that of the second respondent State authority. Had such an attempt been made, then, and then only, would the public policy considerations to which the judge alluded have become relevant. In the state in which the application rested before him, public policy was a wholly irrelevant consideration. The judge ought to have ignored it.

Third, counsel for the appellant and the learned judge appear to have proceeded upon the basis that no reasons had been given for the impugned decision. In this, they were both clearly wrong. This is a case where detailed reasons were given by the second respondent for its decision. Those reasons are to be found in Datuk Ghulam Jelani's affidavit. It is to be remembered that the giving of reasons for a public law decision is not only confined to disclosures made contemporaneously with the impugned decision. It includes reasons made available to the court when the decision is challenged: *Re Tan Sri Raja Khalid bin Raja Harun*. The question whether the respondents were under a duty to furnish reasons is therefore entirely academic in the present instance. That is why we prefaced our discussion on this aspect of the case with the observation that it was not strictly necessary.

Fourth and last, we are in agreement with so much of the learned judge's judgment that holds that the first respondent need not furnish reasons for cancelling the appellant's entry permit. Where we part company with the learned judge is the grounds he has advanced for his conclusion. In our judgment, neither ss 59 nor 59A have the effect of excluding the duty to give reasons. As we have earlier said, all that s 59 does is to deprive an aggrieved person of the benefit of the *audi alteram partem* rule. Upon its language, it certainly has no effect upon other facets of the duty to accord procedural fairness, including the duty to give reasons. Similarly, s 59A is an attempt to immunize decisions made under the Act. It has not the effect the learned judge thought it had. In our judgment, the true principle upon which the first respondent ought not to be required to furnish reasons in a case under s 65 of the Act is that he is a mere amanuensis of the second respondent. Even if he does furnish reasons, all he can say is that he acted in accordance with the direction given him by the second respondent. Since we already know this from the terms of s 65, it becomes unnecessary for the court to look to the first respondent for his reasons. But we must say in all fairness to the first respondent that the incumbent to that office did in fact file an affidavit in the court below in which, apart from making

some very general statements, he says he cancelled the appellant's entry permit because he was directed to do so by the second respondent.

So much for our comment upon the views expressed by the learned judge.

Upon the doctrine of procedural fairness, we find it useful to re-state the more obvious principles that operate in the environment of public law.

(1) The doctrine of procedural fairness includes, but is wider than the rules of natural justice. It encompasses all aspects of fair play in the procedure adopted during a decision making process.

(2) Although the test by which it is gauged is objective, the degree of fairness of the particular procedure adopted is subjective in the sense that it depends upon the peculiar facts and circumstances of the case. It is therefore neither feasible nor desirable to attempt an exhaustive list of what amounts to procedural fairness.

(3) However, there are certain well-recognized classes that fall within the scope of the duty. It includes, for example, the duty of a public decision-maker to furnish reasons for his decision.

In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*, this court held (at pp 536–537) that:

> ... as general rule, procedural fairness, which includes the giving of reasons for a decision, must be extended to all cases where a fundamental liberty guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker. Whether a particular right is a fundamental liberty, and therefore falls within the wide encompass of any of the articles under Pt II of the Federal Constitution is a question that has to be dealt with on a case by case basis. Suffice to say that the instant appeals are concerned with a fundamental liberty.

This view has been criticised by Professor MP Jain in the third edition of his work *Administrative Law of Malaysia and Singapore* (see p 428) as being too restrictive. Criticism that comes from so eminent a source must, in our opinion, be given due weight. Indeed, after careful consideration, we find the criticism to be justified. We therefore consider it wrong to limit the duty to give reasons only to cases concerning fundamental liberties when the authorities that precede *Hong Leong Equipment* do not impose any such restriction. See, eg *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199. In our view, the duty extends to all cases where the rights of a person are adversely affected by a public law decision.

(4) A public decision-maker may not be procedurally compelled to furnish reasons for his decision. However, the absence of reasons may warrant the drawing of what we will call 'the Padfield inference', that is to say, the inference that there are no good reasons for the impugned decision. See *Padfield & Ors v Minister of Agriculture, Fisheries and Food & Ors* [1968] AC 997. In other words:

> ... courts will take into account any reasons which the body may give for its decisions. If it gives no reasons — in a case when it may

reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly (*General Electric Co Ltd v Price Commission* [1975] ICR 1 at p 12, per Lord Denning MR).

(5) There are cases which by their very nature render it neither feasible nor desirable to require a public decision-maker to give reasons for his decision. These include cases that concern national security, public safety or public interest. See *Re Tan Sri Raja Khalid bin Raja Harun; Hong Leong Equipment Sdn Bhd v Liew Fook Chuan.*

Duty to act fairly: substantive fairness

Whether the decision to cancel the appellant's entry permit was substantively fair is a question which the learned judge did not consider at all. Evidentially speaking, there was material before him upon the issue by way of the affidavit of Datuk Ghulam Jelani to which we have already referred. The very same material is now available to us in the Appeal Record. It is therefore open to this court, in the light of the arguments advanced both in the court below and in the second appeal, to deal with the point.

When considering the issue of substantive fairness, the question that falls for determination is whether a reasonable State authority would have directed the cancellation of the appellant's entry permit on the basis of the facts upon which the second respondent acted. Having regard to the objective facts of this case, that question must, in our judgment, receive a negative response.

It cannot be overlooked that the State of Sabah granted the appellant an entry permit despite having in its possession material, albeit outdated, that he was a person of low moral fibre. Since the existence of such unfavourable information did not prevent the grant of an entry permit, it is most unreasonable to rely upon the very same information to direct a cancellation. Put differently, if poor morals was no bar to the grant of an entry permit, they surely cannot form the basis for a cancellation. Unfortunately, this aspect of the case did not receive any consideration from the learned judge.

We are also of the view that the points we have made thus far provide an equally satisfactory answer to the submissions based on policy considerations advanced by the learned State Attorney General. It was argued that it is entirely a matter for the State authority of Sabah to decide the kind of persons who should be permitted to belong to that State under the entry permit system. It was said, in effect, that bad moral character is a ground upon which the State authority may direct the cancellation of an entry permit and thereby prevent a person from 'belonging' to Sabah under s 71 of the Act. With respect, we regret we are unable to accept this submission. The State authority is under a duty to exercise its powers in accordance with those articles of the Federal Constitution that confer fundamental liberties.

In the premises, we are of the very respectful view that the decision by the second respondent to direct a cancellation of the appellant's entry permit is not substantively fair.

The result

For the reasons we have already given, the cancellation of the appellant's entry permit is null and void and of no effect. It follows that both the first and second appeals succeed and that certiorari must issue to remove and quash the cancellation of the appellant's entry permit. With the quashing of the cancellation, the decision of the second respondent housed in the act of cancellation must, as a matter of pure consequence, meet with the same fate. We would therefore make the following orders in respect of the first appeal:

(1) the appeal is allowed;

(2) the order of Ian Chin J, made on 26 December 1997 is hereby set aside;

(3) there shall be an order in terms of prayer (1) of the appellant's amended notice of motion;

(4) the costs of the first appeal and all costs occasioned in the court below shall be taxed and paid by the second respondent to the appellant;

(5) there shall be no order as to costs against the first respondent;

(6) the deposit lodged in court shall be refunded to the appellant.

In respect of the second appeal, we make the following orders:

(1) the appeal is allowed;

(2) the order of Suleiman Hashim J is set aside;

(3) there shall be no order as to costs of the appeal.

(4) the deposit lodged in court shall be refunded to the appellant.

Appeals allowed.

Reported by Loo Lai Mee